IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6264 OF 2006.

Sulabai Shamrao Patil and others. ... Petitioners.
Versus.
Vidya Apopasaheb Wadkar. ... Respondent.

Shri Pramod Kathane i/by Shri K.S.Patil for the Petitioners.

Shri S.G.Deshmukh for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 16th April, 2007.

P.C.:

1. I have heard the submissions of the learned Advocates appearing for the parties on the last date. By order dated 15th February 2007, this Court directed that the writ petition will be decided finally at admission stage.

2. The Petitioners are the legal representatives of the original Defendant in the suit filed by the Respondent. Admittedly a written statement was filed by the original Defendant in the suit on 26th October 1998. After the Petitioners were brought on record in their capacity as legal representatives of the deceased Defendant, they failed to file written statement and therefore, on 7th April 2004, the learned trial Judge passed an order directing that the suit will proceed without written statement of the Petitioners. On 1st February 2005, an application was made at Exh.55 by the

Petitioners praying that the order passed by the trial Court for proceeding with the suit without the written statement may be set aside and the purshis filed by the Petitioners be taken on record in which it was stated by the Petitioners that they were adopting the written statement filed by the original Defendant. By order dated 1st February 2005, the learned trial Judge rejected the application at Exh.55 by observing that the order of no written statement was passed on 1st April 2004 and that the application for setting aside the said order was made after lapse of more than one year.

3. I have heard the submissions of the learned Advocates appearing for the parties. The learned Advocate for the Respondents opposed the petition by pointing out that the Application has been belatedly made.

4. The Petitioners were substituted in place of the original Defendant in their capacity as the legal representatives of the deceased Defendant. Under sub-rule (2) of Rule 4 of Order XXII of the Code of Civil Procedure, 1908 a legal representative is entitled to make any defence appropriate to his character as a legal representative of the deceased Defendant. The legal representative cannot raise any defence which is inconsistent with the defence which is already raised by

the deceased Defendant.

5. In the present case, written statement was filed by the original Defendant. All that was sought to be done by the Petitioners was to adopt the written statement filed by their predecessor. The effect of the purshis which was tendered along with the application at Exh.55 was that the written statement of the original Defendant will be treated as the written statement of the Petitioners. As the predecessor of the Petitioners had filed written statement, the defences in the written statement filed by the deceased were always available to the Petitioners as for all practical purposes, the written statement filed by the original Defendant was the written statement of the Petitioners. The learned trial Judge, in my view, has taken a very hypertechnical view of the matter while rejecting the application at Exh.55. The said application deserves to be allowed as there was no prejudice caused to the Respondent.

6. Hence the petition is disposed of by the following order:

(i) The impugned order dated 1st December 2005 is quashed and set aside and Application at Exh.55 made by the Petitioners is allowed.

(ii) The learned trial Judge is directed to take the purshis filed by the Petitioners along with Application Exh.55 on record. In view of the said Purshis, the written statement filed by the original Defendant shall be treated as the written statement of the Petitioners.

(iii) Writ petition is allowed in the above terms with no order as to costs.

(iv) Parties and the trial Court to act on an authenticated copy of this order.

Judge.